

## **405 KAR 24:030. Process and criteria for designating lands unsuitable for surface mining operations.**

RELATES TO: KRS 350.465(2)(b), 350.610

STATUTORY AUTHORITY: KRS Chapter 13A, 350.465(2), 350.610

NECESSITY, FUNCTION, AND CONFORMITY: KRS 350.465(2) and 350.610 require the cabinet to prepare, develop, and promulgate a permanent regulatory program for the implementation of SMCRA containing procedures similar to that Act. This administrative regulation sets forth procedures and criteria for reviewing petitions seeking designation of lands as unsuitable for all or certain types of coal mining operations and for the termination of designations.

Section 1. General. The following procedures and criteria establish a process enabling objective decisions to be made on land areas, if any, which are unsuitable for all or certain types of surface coal mining operations. These decisions shall be based on the best available, scientifically sound data and other relevant information.

Section 2. Lands Exempt From Designation. (1) Petitions for designating lands as unsuitable for all or certain surface coal mining operations will not be considered for:

- (a) Lands on which surface coal mining operations were being conducted on August 3, 1977;
- (b) Lands covered by a permit issued under KRS Chapter 350 or a permit application for which the public comment period has closed according to Section 3(6) of this administrative regulation;
- (c) Lands where substantial legal and financial commitments were in existence prior to January 4, 1977 in such surface coal mining operations.

(2)(a) "Substantial legal and financial commitments" means significant investments, that have been made on the basis of a long-term coal contract, consisting of actual expenditures of substantial monies or execution of valid and binding contracts involving substantial monies for such things as power plants; railroads; coal handling, preparation, extraction, and storage facilities; and other capital-intensive activities such as:

- 1. Improvement or modification of coal lands within, for access to, or in support of surface coal mining and reclamation operations in the petitioned area;
- 2. Acquisition of capital equipment for use in, for access to, or for use in support of surface coal mining and reclamation operations in the petitioned area; and
- 3. Exploration, mapping, surveying, and geological work, as well as expenditures of engineering and legal fees, associated with the acquisition of the property or preparation of an application to conduct surface coal mining and reclamation operations in the petitioned area.

(b) The costs of acquiring the coal in place or the right to mine such coal are not sufficient to constitute a substantial legal and financial commitment in the absence of other investments as described in paragraph (a) of this subsection.

Section 3. Initial Processing of Petitions. (1) Within thirty (30) days of the receipt of a petition to designate or terminate, the cabinet shall notify the petitioner by certified mail whether or not the petition is complete. A petition shall be deemed incomplete if the cabinet finds that the petition does not contain all information required by 405 KAR 24:020, Sections 3 and 4.

(2) If the cabinet determines that the petition is incomplete, it shall be returned to the petitioner with a written statement of the reasons for the determination and the categories of information needed to make the petition complete.

(3) The cabinet shall determine whether any identified coal resources exist in the area described in the petition. Should the cabinet find that there are no identified coal resources in that area, the petition shall be returned to the petitioner with a statement of findings.

(4) If the cabinet determines the petition to be frivolous or that the petition does not meet the requirements of 405 KAR 24:020, Section 2, it shall be returned to the petitioner with a written statement of the reasons for the determination and the categories of information needed to make the petition complete. A frivolous petition is one in which the allegations of harm lack serious merit.

(5) When considering a petition for an area which was previously and unsuccessfully proposed for designation, the cabinet shall determine if the new petition presents substantial new allegations of facts and objective evidence. If the petition does not contain new and substantial allegations of facts, the cabinet shall return the petition with a statement of its findings and a reference to the record of the previous designation proceedings.

(6) Petitions received after the close of the public comment period on a permit application relating to the same area shall not prevent the cabinet from issuing a decision on that permit application. The cabinet may return such a petition to the petitioner with a statement of why the cabinet will not consider the petition. For the purposes of this administrative regulation, the close of the public comment period shall mean at the close of the period for filing written comments and objections under 405 KAR 8:010, Sections 9 and 10.

Section 4. Notification and Request for Information. (1) The cabinet shall periodically notify the petitioner of applications for a permit received which propose to include any area covered by the petition. The cabinet shall begin this notification procedure only after it has determined that the petition is complete and has so notified the petitioner.

(2) Within twenty-one (21) days after the determination that a petition is complete, the cabinet shall circulate copies of the petition form to, and request submission of relevant information from:

- (a) Other interested government agencies;
- (b) Area-wide development district agencies;
- (c) The petitioner;
- (d) Intervenors; and
- (e) Other persons known to the cabinet to have an interest in the property.

(3) Within twenty-one (21) days of the final determination that the petition is incomplete or frivolous, the cabinet shall notify the general public of the receipt of the petition and the cabinet's determination that the petition is incomplete or frivolous by one (1) newspaper advertisement in the newspapers specified in subsection (4)(a) and (b) of this section.

(4) Within twenty-one (21) days after the determination that a petition is complete, the cabinet shall notify the general public by newspaper advertisement. The notice shall identify the petitioner and provide the mailing address of the petitioner. The notice shall request submissions of relevant information; and shall request that persons with an ownership or other interest of record in the property covered by the petition, who wish to be notified of any hearing, identify themselves to the cabinet. The advertisement shall be placed once a week for two (2) consecutive weeks:

(a) In the newspaper of largest bona fide circulation, according to the definition in KRS 424.110 to 424.120, in the county of the area covered by the petition; and

(b) In the newspaper of largest circulation in the state.

(5) Until three (3) days before the cabinet holds a public hearing on the petition pursuant to Section 7 of this administrative regulation, any person may intervene in the preceding, by filing:

- (a) The intervenor's name, address, telephone number, and notarized signature;
- (b) Identification of the intervenor's interest which is or may be adversely affected;
- (c) A short statement identifying the petition;
- (d) Allegations of fact and objective evidence which would tend to establish or dispute the allegations found in the petition.

Section 5. Data Base and Inventory System. (1) The cabinet will develop and maintain a data

base and inventory system which will permit evaluation of reclamation feasibility in areas covered by petitions.

(2) The cabinet will include in the data base and inventory system, information relevant to the criteria in Section 8 of this administrative regulation.

(3) The cabinet will include in the data base and inventory system sufficient information to prepare the statements required in Section 8(4) of this administrative regulation, including information on:

- (a) The coal sources of Kentucky;
- (b) The demand for Kentucky coal;
- (c) The supply of Kentucky coal;
- (d) The economy of Kentucky and its coal mining regions; and
- (e) The environment and natural resources of Kentucky.

(4) The cabinet will include in the data base and inventory system relevant information that comes available from petitions, publications, studies, experiments, permit applications, surface coal mining operations, and other sources. The cabinet will also include relevant information received from the U.S. Fish and Wildlife Service, the Kentucky Heritage Commission, and the cabinet's Division of Air Pollution Control.

Section 6. Public Information. (1) Beginning immediately after the cabinet receives a petition, it shall compile and maintain a record consisting of the petition and all documents relating to the petition filed with or prepared by the cabinet. This record shall be maintained at the central office of the department in Frankfort and the regional office within whose district the petition site is located.

(2) The cabinet shall make the record, data base and information system available for public inspection, pursuant to KRS 61.870 et seq.

(3) The cabinet shall provide information on the petition procedures necessary to designate (or terminate a designation of) an area as unsuitable for surface coal mining operations.

(4) The cabinet shall describe how the inventory and data base can be used.

(5) Notwithstanding the requirements in subsections (1) through (4) of this section, if the cabinet determines that the disclosure of information relating to the location of properties proposed to be nominated to, or listed in the National Register of Historic Places would create a risk of destruction or harm to such properties, such disclosure will not be made.

(6) The cabinet shall make available to any person any information within its control regarding designations, including mineral or elemental content which is potentially toxic in the environment. The cabinet will not, however, provide proprietary information on the chemical and physical properties of coal.

Section 7. Hearing Requirements. (1) Within ten (10) months after receipt of a complete petition, the cabinet shall hold a public hearing in the locality of the area covered by the petition. However, when a permit application is pending before the cabinet and such application involves an area in a petition, the cabinet shall hold the hearing on the petition within ninety (90) days of its receipt. If all petitioners and intervenors agree, the hearing need not be held. The hearing shall be legislative in nature, without cross-examination of witnesses. No person shall bear the burden of proof or persuasion. The cabinet shall make a verbatim record of the hearing.

(2) The cabinet shall give notice of the date, time, and location of the hearing to:

(a) Local, area-wide, state, and federal agencies which may have an interest in the decision on the petition;

(b) The petitioner and the intervenors; and

(c) Any person with an ownership or other interest in the area covered by the petition who has identified himself or herself to the cabinet as set forth in Section 4(3) of this administrative regulation or who is otherwise actually known to the cabinet.

(3) Notice of the hearing shall be sent by certified mail to the petitioner and any intervenors and by regular mail to the persons designated in subsection (2)(a) and (c) of this section, and be post-marked not less than thirty (30) days before the scheduled date of the hearing.

(4) The cabinet shall notify the general public of the date, time, and location of the hearing by placing an advertisement in the newspaper of largest circulation according to the definition in KRS 424.110 to 424.120, in the county of the are covered by the petition once a week for two (2) consecutive weeks and once during the week prior to the scheduled date of the public hearing. The consecutive weekly advertisement must be published four (4) and five (5) weeks before the scheduled date of the public hearing.

(5) The cabinet may consolidate in a single hearing, the hearings required for each of several petitions which relate to areas in the same locale.

(6) In the event that all petitioners and intervenors stipulate agreement prior to the hearing, the petition may be withdrawn from consideration.

Section 8. Criteria and Decision. (1) The cabinet shall designate an area as unsuitable for all or certain types of surface coal mining operations if, upon petition, it determines that reclamation is not technologically and economically feasible under the performance standards of 405 KAR Chapters 7 through 24 at the time of designation.

(2) The cabinet may designate an area as unsuitable for all or certain types of surface coal mining operations if, upon petition, it is determined that the surface coal mining operations will:

(a) Be incompatible with existing land use policies, plans, or programs adopted by state, area-wide, or local agencies with management responsibilities for the areas which would be affected by such surface coal mining operations;

(b) Affect fragile or historic lands in which the surface coal mining and reclamation operations could result in significant damage to important historic, cultural, scientific, and aesthetic values and natural systems;

(c) Affect renewable resource lands in which the surface coal mining operations could result in substantial loss or reduction of the long-range availability of water supplies;

(d) Affect renewable resource lands in which the surface coal mining operations could result in substantial loss or reduction of the long-range productivity of food and fiber products; or

(e) Affect natural hazard lands in which the surface coal mining operations could substantially endanger life and property.

(3) If the cabinet does not designate a petitioned area under subsection (2) of this section, the secretary may direct that any future permits issued for the area contain specific requirements for minimizing the impact of surface coal mining operations on the feature that was the subject of the petition.

(4) Prior to designating any land areas as unsuitable for surface coal mining operations, the cabinet shall prepare a detailed statement, using existing and available information, on the potential coal resources of the area, the effect of the action on demand for, and supply of, Kentucky coal, and the environmental and economic impacts of designation.

(5) In reaching a decision, the secretary shall use:

(a) The relevant information contained in the data base and inventory system;

(b) Relevant information provided by other governmental agencies;

(c) The detailed statement prepared in response to subsection (4) of this section; and

(d) Any other relevant information or analysis submitted during the comment period and public hearing.

(6) A final written decision shall be issued by the secretary including a statement of reasons, within sixty (60) days of completion of the public hearing, or, if no public hearing is held, then within twelve (12) months after receipt of the complete petition. The cabinet shall simultaneously send the

decision by certified mail to the petitioner, all intervenors, and to the Regional Director of the Office of Surface Mining, U.S. Department of the Interior; and by regular mail to all other persons involved in the proceedings.

Section 9. Administrative and Judicial Review. (1) Following any order or determination of the cabinet concerning completeness or frivolousness of a petition, any person with an interest which is or may be adversely affected may request a hearing on the reasons for the order or determination, in accordance with 400 KAR 1:110, Section 9. Any person with an interest which is or may be adversely affected and who has participated in an administrative hearing under this subsection shall have the right to judicial review as provided in KRS 350.610(6).

(2) Any person with an interest which is or may be adversely affected by a final decision of the secretary under Section 8(6) of this administrative regulation shall have the right to judicial review as provided in KRS 350.610(6).

Section 10. Map. The cabinet shall maintain a current map of areas designated as unsuitable for all or certain types of surface coal mining operations at each regional office and at the central office in Frankfort. Copies of such maps will be available for inspection and copying as prescribed in the Open Records Act, KRS 61.872 to 61.884. Such maps will periodically be distributed to appropriate federal, state, area-wide, and local government agencies. (8 Ky.R. 1595; 9 Ky.R. 721; eff. 1-6-1983; 12 Ky.R. 582; eff. 12-10-1985; 15 Ky.R. 515; eff. 12-13-1988; TAm eff. 5-4-2018; Crt eff. 7-3-2018.)